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### **The Consequences of Possession**

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## Abstract

This article is the introductory chapter of Eric Descheemaeker (ed.), *The Consequences of Possession* (Edinburgh: Edinburgh University Press, 2014), a book which comprises the papers that were presented at a namesake conference at Old College, University of Edinburgh, in 2012 by the following scholars: Craig Anderson (Robert Gordon), Raffaele Caterina (Turin), Simon Douglas (Oxford), Yaëll Emerich (McGill), Robin Hickey (Durham), Duard Kleyn (Pretoria), Lena Kunz (Heidelberg) and Thomas Rübner (Trier).

The subject-matter of the book is the consequences of possession, examined from a comparative and historical perspective. Leaving aside the question on what possession is, a question that has caused a considerable amount of ink to be spilled for centuries (at least in the civilian tradition), it concerns itself with the law's response to the recognition of a factual situation as amounting to 'possession' (or an equivalent concept like '*possessio*', 'possession' or '*Besitz*'). It is the first attempt to look in a coherent fashion at the topic of possession in a comparative and historical perspective, bringing together scholars from the civilian tradition (Germany, Italy) as well as the common law (England) and mixed legal systems (Quebec, Scotland, South Africa).

This introductory chapter examines four questions: 1) Why protect possession?; 2) How is possession protected?; 3) How does the fact of possession relate to any rights to or of possession?; 4) What is so-called "quasi-possession"? One theme that is highlighted throughout the chapter is that the distance between the two great western legal traditions in this field might not be as great as is commonly believed, English law and modern civilian systems having both emerged at the crossroads of Roman law, canon law and feudalism. In this, the two of them belong to a pan-European current of concepts and doctrines which has shaped the modern law in all the jurisdictions examined, if in markedly different ways.

## Keywords

Possession, *possessio*, *Besitz*, interdicts, *rei vindicatio*, Pollock and Wright, consequences of possession, custody, detention, *detentio*, possession of rights, quasi-possession, *quasi possessio*, civil possession, *possessio civilis*, natural possession, *possessio naturalis*, *vi clam precario*, Savigny, Jhering, *actio spoli*, *spuilzie*, *corpus*, *animus domini*, *animus rem sibi habendi*, *animus tenendi*, *animus possidendi*, *interdictum de vi*, *interdictum uti possideti*, *interdictum utrubi*, *Gewere*, *saisine*, *seisin*, *réintégrande*, *complainte*, *ius possidendi*, *ius possessionis*.

## THE CONSEQUENCES OF POSSESSION

*Eric Descheemaeker\**

Labeo, at the turn of the Christian era, tells us that he who “sits” over a thing (*res*) possesses it.<sup>1</sup> Subject to a difficulty about what sort of entities can be possessed,<sup>2</sup> the metaphor could hardly be clearer: possession speaks of factual control, with its unavoidable corollary, the power to exclude others. In that sense, possession does not have to be invented by lawyers: it pre-exists any form of apprehension of reality by the interpretative and creative power of the law. This is probably the reason, or at least part of the reason, why it is routinely described as a raw “fact”:<sup>3</sup> while this assertion needs to be severely nuanced, precisely because the intervention of the law is bound to bring in a degree of artificiality, it has to be our starting point both historically and conceptually: possession describes a relationship of factual control of a person over a thing.

From a civilian perspective at least (but this is language that can also be understood by common lawyers, and might in fact belong to the shared, pre-legal intuitions of mankind),<sup>4</sup> possession will invariably be contrasted with ownership: whether there is any underlying analytical necessity or not, any reader will know from experience that no analysis of either concept is allowed to continue for long without the other being brought in as part of an exercise in contrast and differentiation.<sup>5</sup> The dichotomy seems indeed simple and intuitively graspable by any layman: on the one

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\* University of Edinburgh. Thanks to George Gretton and Robin Hickey for their helpful comments on an earlier draft of this chapter.

<sup>1</sup> D 41.2.1 *pr.* (Paul, 54 *ad Edictum*): “Possession is so styled, as Labeo says, from ‘seat’ (*a sedibus*), as it were ‘position’, because there is a natural holding, which the Greeks call *κατοχή*, by the person who stands (*insistit*) on a thing” (tr Watson Digest); cf F Schulz, *Classical Roman Law* (1951) 428. The same metaphor can be found in German *Besitz* (from *sitzen* = to sit). *Contra*: J-L Halpérin, *Histoire du droit des biens* (2008) 37.

<sup>2</sup> The problem of the protection of incorporeals will be returned to in part D. For the sake of simplicity, it will be ignored until that point; and the “thing” will be assumed to be corporeal, i.e. tangible.

<sup>3</sup> See below, s C.

<sup>4</sup> The suggestion is made in A M Honoré, “Ownership”, in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107 at 107.

<sup>5</sup> See also below (n 48).

hand, the possessor says, “I have it!”; on the other, the owner claims, “it is mine!”<sup>6</sup> The neatness of the distinction provides us with an anchor that the artificiality of the law can never completely undo.

Yet difficulties are bound to crop up almost immediately. Sooner or later, “it is mine” will want to translate into either “I have it” or “I want to have it”: by asserting ownership, the *rei vindicatio* seeks possession.<sup>7</sup> An abstract assertion of ownership is no good to anyone; and no-one would dream of telling the victim of theft that he has no cause to complain because the thing stolen is still *his*, wherever it might happen to be on the face of the earth. As to the claim that “I sit upon Daisy”,<sup>8</sup> my cow, it is also bound to cause difficulties to the lawyer who seeks to analyse it: if I have Daisy and no-one challenges my power to exclude them from her, it seems that private law, being concerned with disputes between individuals, does not have anything to say about what is, again, the mere description of a fact. Where it might want to intervene, on the other hand, is if I am *challenged* in my possession.

But here, two different difficulties arise. The first one is that, as likely as not, Daisy has already been taken away from me: I come back to the field at night to find that a thief has led her astray. Unless the law artificially restricts or alters the layman’s understanding of possession, I am no longer the possessor; the thief is. He sits on her, not me. If I no longer have possession, my now extinct possession cannot by construction be protected: if I want to claim, *prima facie* it would have to be on the basis that I once *was* in possession. The alternative would be for the law to declare that I still am in possession and that either the thief is not, or that his newly-acquired possession is for some reason of lesser quality than mine: in both cases, artificiality

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<sup>6</sup> Non-technical terms, “have” and “be”, are used deliberately. The corresponding legal concepts, “possession” and “ownership”, are the product of the gradual refinement by the legal community of basic, pre-legal intuitions of the human mind. This is reflected in the words of the *rei vindicatio*, which did not ask whether the claimant “owned” the thing but whether it was “his”. (See P Birks, “The Roman law concept of *dominium* and the idea of absolute ownership” (1985) *Acta Juridica* 1at 5; compare the wording of the *interdictum de vi armata*, [below xxx](#)).

<sup>7</sup> It is true that English law, in particular, does not think along such lines and, subject to some nuancing, cannot be said to have for movables any mechanism like the *rei vindicatio*: failing a voluntary return of the thing disputed between two parties, the successful claimant will receive money damages. But it should not be controversial to say that the monetary award is, to use Robert Stevens’ terminology, “substitutive” for the value of the underlying protected legal relationship. In fact, for entirely different reasons, the Roman plaintiff would be left in exactly the same situation. Whether the successful plaintiff actually gets the *res* back is immaterial; the important point is that the law sees as detrimental the fact that the owner cannot be rejoined with it and is willing to award a remedy on that basis.

<sup>8</sup> The cow Daisy (occasionally renamed Buttercup) will of course evoke memories for readers familiar with the works of the late Peter Birks, who was Professor of Civil Law in Edinburgh from 1981-1987.

creeps in and drives a wedge between the layman's and the lawyer's understanding of the term.<sup>9</sup> With artificiality will come complications and, often, muddle.

The second difficulty is; why should the law care to intervene if Daisy has been taken away from me? One answer would be to say "because she is mine": this provides at first sight a sound reason; but in that case the basis for the law's protection would really be ownership, not possession past or present. Again, our seminal distinction between the two notions collapses. If the law wants to protect possession quite apart from ownership, as its rhetoric has always claimed to in systems rooted in Roman law, it will have to intervene whether or not Daisy is mine. This is not unthinkable but it does raise difficult questions. For instance, what if I am myself a thief; Daisy was never mine in the first place and I know it. Should I be able to appeal to the law – whether against the entire world, including the rightful owner, or at least against third parties? It seems implausible for the law to want to protect the status quo whenever someone sits over a thing and see his position challenged. If possession is not protected on the basis that it is indirectly ownership that is contemplated, it seems likely that other distinctions will need to be drawn, for example between good and bad faith,<sup>10</sup> or between peaceful and violent possession. These are difficulties that will need returned to. What they highlight is the fact that the exercise in distinction between possession and ownership is not as simple as we might have thought first.

If we move, in our attempt to define (at least provisionally) our subject-matter, from contradistinction to the identification of a core, more difficulties will be encountered, which will make it difficult to say anything about possession that would be uncontroversial. One particular difficulty is that the discrepancy between the layman's understanding of possession ("sitting over") and the law's refinement of it is a complex one. Not only does the law not protect all instances of sitting, as one would expect; it frequently provides a remedy to a non-sitter under the label of possession. Besides, sometimes the term "possession" (*possessio*, *possession*, *Besitz*) is used to describe only such instances where the law is willing to intervene if the holding is challenged, and sometimes it is not. To put the same point different, possession may or may not mean legally protected possession; thus, depending on the context, the

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<sup>9</sup> Roman law chose the first branch of the alternative: D 41.2.3.7 (Paul, 54 *ad Edictum*). Ulpian's rationalisation of the solution is puzzling: "If a person be evicted forcibly from possession, he is treated as still possessing, since he has the ability to recover possession by the interdict *de vi*" (D 41.2.17 = Ulpian, 76 *ad Edictum*; on the interdict *de vi*, see below, xxx).

<sup>10</sup> The distinction between the two types of possession was made explicitly by Paul: D 41.2.3.22 (Paul, 54 *ad Edictum*).

qualification might but need not be redundant. This makes it particularly difficult to find a stable terminology, in the absence of which clear thinking will be threatened.

Of course, the difficulty of identifying a sufficiently stable basis on which to build increases rapidly the moment one seeks to add a comparative (or historical) dimension to the study. Every comparatist will know this, and will also know that the extra difficulties can be more or less great, depending both on the jurisdictions under consideration and the proposed field of study. In this respect, few would probably want to deny that studying possession across the divide between the civilian tradition and the common law would be close to the more difficult end of the spectrum.<sup>11</sup> Some might go as far as denying the feasibility of such a transsystemic study. The above starting point, approaching possession by contradistinguishing it from ownership, does indeed look distinctively civilian; and the very existence of the dichotomy is often denied in the context of English law. While the word “possession” and the underlying concept clearly do exist in the common-law tradition, whether they paint an even broadly similar picture to that of the Romanist tradition will be doubted by many. Although the distance might not in fact be as great as is sometimes believed, as indeed this book seeks to show in a number of respects, still the starting point has to be that the two legal traditions proceed (at least on the face of it) from significantly different perspectives.

We shall come back to the issue; suffice it to say at this point that it is apparent from even a cursory look at modern English scholarship that the twin Romanist concepts of possession and ownership have sufficiently permeated the modern law for it to be entirely legitimate, and meaningful, to analyse the common law through that prism (which naturally is not to deny that the way they relate to the home-grown materials is a difficult and controversial issue). To a large extent, 125 years after Pollock and Wright’s seminal *Possession in the Common Law*,<sup>12</sup> the self-understanding of modern English law has been largely recast in Roman forms of thinking: this might conceivably be lamented, but it cannot be denied. So, while we must be careful not to underestimate the distance that exists between systems of law with clearly diverging histories, we must be equally careful not to overstate it in the

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<sup>11</sup> One does not want to understate differences within the civilian tradition either; a common danger of focusing on the divide between the two great Western legal traditions is to imply, by contrast, that both sides form a block. Clearly they do not, as this chapter will make plain.

<sup>12</sup> Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (1888).

modern law, and in particular not to be overimpressed by what might be purely formal differences.

At any rate, within the law of property (another Romanist concept appropriated by English law), it would be fair to say that possession is least open to the criticism of conceptual imperialism: partly because the word has belonged to the actional substance of the law for centuries;<sup>13</sup> partly because, as mentioned at the outset, possession is primarily the description of a factual situation between person and thing which, under one name or another, is bound to exist anywhere where persons and things coexist. (Naturally, this is not to say that the legal refinement of the notion is system-neutral, which clearly it is not; but the unrefined, common sense notion underpinning it is bound to have a much higher degree of validity across jurisdictional boundaries). While this book is dominated by civilian contributors, it naturally has the ambition not to misrepresent the common-law tradition: neither misunderstanding its distinctive character nor – an equally common trap for comparatists – assuming that it is fundamentally different because this is how some have wished to represent it.

To return to the subject-matter of the book, the topic of the conference was “the consequences of possession” but, in order to limit the scope of a very wide topic, the specification was immediately made that what we were interested in was the consequences of possession in and by itself: leaving aside the definitional problem for now, what this meant was to exclude any consequences which are triggered by more than the “sitting over” – such doctrines as prescriptive acquisition, based on the passing of time and often some sort of justificatory original transaction, or the acquisition of fruits, which supposes the coming into existence of such fruits and thus, again, time. Rather, the emphasis was to be on the *protection* of possession: given the mere fact of possession as the sitting over a thing (as possibly tweaked by the law’s later refinement of the concept), what are the legal remedies that can be sought if such possession is being interfered with? This is what this book primarily – albeit not exclusively – concerns itself with, and what the present introduction will focus on.

While possession is one of the legal topics which have caused the most ink to flow within private law, especially over the last two hundred years, it is hoped that this volume can in fact bring new light to the debate, because it is one of the first

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<sup>13</sup> Below (n 39).



attempts – certainly, the first on this scale – to study the topic comparatively. It has been rightly observed that the comparative study of the law of property lags behind that of, for example, the law of obligations.<sup>14</sup> It is not difficult to see why, but neither should we be content: the benefits of the comparative exercise are, whatever its outcome, too obvious to state. Naturally, bringing together the common law and the civilian tradition adds a further challenge, and this book has no other ambition than to bring some new bricks to the edification of our knowledge and understanding of the field. It will have achieved its goal if it spurs further comparative investigation in a way that does justice to the complexity of the law.

The conference was to focus on the main civilian jurisdictions (France, Germany, Italy, Spain) – unavoidably bringing out, behind them, Roman and canon law; also on English law; and, as befits a Scottish enterprise, on mixed legal systems. Contributions were made by lawyers educated or working in England, France, Germany, Italy, Quebec, Scotland and South Africa: their papers make up the rest of this book. The aim of this introductory chapter is to help contextualise them by providing some background information against which their significance can be better appreciated.

Four questions will be addressed more specifically, the first two concerning possession and its protection, while the third and fourth address, more briefly, two recurrent puzzles concerning the law of possession, which the book also deals with from a comparative perspective. These four questions are: 1) Why protect possession?; 2) How is possession protected?; 3) How does the fact of possession relate to any rights *to* or *of* possession?; 4) What is so-called “quasi-possession”?

## **A. WHAT IS POSSESSION AND WHY PROTECT IT?**

Protecting possession: the first question we might want to ask is, Why? It was already mentioned that there is nothing self-evident with the preservation of the status quo (or status quo ante): without more, the claim that “I am (or was) sitting over Daisy” does not, according to common morality, disclose a good reason for the law to intervene. A further complication is brought by the fact that the law does not protect every sort of holding: whether it restricts the use of the word “possession” to such instances as are protected by the law, or holds that only some types of possession give rise to redress

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<sup>14</sup> S van Erp & B Akkermans (eds), *Cases, Materials and Text on National, Supranational and International Property Law* (2012) viii.

when they are interfered with, one needs to look at the situations where the law does indeed seek to provide a remedy to understand why it might want to do so. The question, “Why protect possession?” is thus inextricably intertwined with that other question, “What is (legally protected) possession?”

This is a bold question to ask. As even the non-specialist will know, thousands of pages have been written on the topic, in Germany alone, in the sole context of Roman law. Providing a nuanced answer in a historical and comparative perspective would be a colossal task, far beyond the ambitions of this introductory chapter. Nor can the answer be, tempting though it may be, to take as a starting point the “official” definition that some legal systems have cared to provide, for instance that of the French Civil Code:<sup>15</sup> this would unwarrantedly tilt the debate towards a particular jurisdiction. Indeed, assuming that words have, across jurisdictional and temporal divides, the meaning that one was first exposed to is one of the most redoubtable mistakes that comparatists can make, more often than not in perfectly good faith.

What we should attempt to do, instead, is stand back and try to identify, in the great mass of historical data centring on the (pre-legal) idea of controlling a thing, the common core or cores of the legal doctrines which seek to address this factual situation. Perhaps paradoxically, asking the question at such a high level of generality, across the divide between the civilian and common-law traditions, and without reference to any particular jurisdiction or point in time, makes it in fact much easier to identify some key ideas that will serve, at least provisionally, as a guide through the thicket. This is what this section endeavours to do.

### **(1) Three levels of possession**

Despite the obvious danger of oversimplification, it seems fair to say that, historically, we can identify three different types of possession in the eyes of the law.<sup>16</sup> This

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<sup>15</sup> Art 2255 (formerly 2228) French Civil Code: “*La possession est la détention ou la jouissance d'une chose ou d'un droit que nous tenons ou que nous exerçons par nous-mêmes, ou par un autre qui la tient ou qui l'exerce en notre nom*” [Possession is the holding or enjoyment of a thing or a right which we hold or exercise by ourselves, or through another who holds or exercises it in our name] (my translation).

<sup>16</sup> This survey is limited to cases of what is generally referred to as direct possession (in German scholarship, where the distinction was first articulated, *unmittelbarer Besitz*, “immediate possession”), contrasted with indirect (*mittelbarer*, “mediate”). The omission is deliberate: possession properly speaking is immediate – i.e. personal – possession. The doctrine of mediate possession is a construct which allows the law to explain how a person can be deemed to have possession even though he is not sitting over a thing, by considering that others are sitting over it on his behalf. It really is concerned with issues of representation and attribution although, to complicate the matter further, these issues are

picture can be reconciled with all the legal systems in contemplation, even though they might not all either distinguish between the three or, if they do, attach different legal consequences to them. (Because the received terminology is unstable, it is proposed to adopt a different one for the purpose of this brief survey.)

At the top lies possession in the manner of an owner – “owner” being understood in the above sense of he who can claim “the thing is mine!” By this is meant that the “sitter” over the thing behaves in relation to it as if it were his and he enjoyed the ordinary prerogatives of the owner. To put it differently, he does not acknowledge any rival claim from someone else who might turn up and assert that Daisy is actually *his*. This might be because he really is the owner; because he mistakenly believes himself so to be (for example he bought the thing from someone who represented himself as the owner but was not); or because he has decided to disregard the claims of any rightful owner (the typical example of this being the thief).

Next is possession in the manner of a holder who knows himself not be the owner and does not seek to challenge the prerogatives of the latter. Obvious examples will be the tenant of land or the borrower of a movable thing: both obviously control the thing, but they also recognise their possession to be somehow derivative – whatever exactly this might mean – and, in some sense at least, of inferior quality compared to the first scenario. Typically, although complications are possible, they will be in control of the thing as a result of an agreement with the owner and possess in good faith. Whilst it is not obvious that the law should treat this scenario differently from the first, it is easy to see why it *might* want to, and thus why we need to keep both categories analytically distinct.

Finally, there is the possession-sitting of the person who holds the thing for a brief period of time and typically exercises his momentary control in a way that makes it plain to the world that he does not stand in a special relationship with the thing, apart from his transient holding. Though the line is evidently difficult to draw between this category and the previous one, core and intuitive cases include the

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often not distinguished analytically from the separate issue of retention of (direct) possession after control has been lost: while the result might be the same in practice (e.g. a landlord will be regarded as having possession of the house he has let out), the legal issues are quite distinct depending on the chosen approach. For the same reason, possession by juristic persons will be ignored. While this is a vastly important topic in practice, the way the law gets around the obvious difficulty that a legal person has no limbs to “sit over” a thing involves doctrine of representation and attribution which, again, are part of the law of persons, not property and thus need not be pursued here.

examples, often given, of a guest holding a knife at a dinner party or a valet carrying a suitcase.

*Terminology.* This lowest degree of holding will not normally be called “possession” at all, but rather “custody” or “detention”.<sup>17</sup> Although, etymologically, the content of these three notions is essentially identical, the latter two tend to be pressed into service to designate a form of control that is regarded as less strong than first one. For the present purpose, we might want to refer to this lowest tier as level-three possession.

The top degree will be called either “possession” *simpliciter*, if it is the only type that is protected at law, or something else, like “civil possession”. However, the label “civil” applied to possession is plagued with instability and is probably best avoided, especially in a comparative perspective;<sup>18</sup> at the very least it should not be used without specifying what is meant by it. We can call this type of holding “owner-like possession” or level-one possession.

Perhaps unsurprisingly, the middle tier turns out to be the most troublesome. Sometimes called “natural (or corporeal) possession”<sup>19</sup> – again, both labels should be avoided unless clearly defined – sometimes also “detention” like the lowest level: we shall refer to it as “holder-like”, or level-two, possession.

The difficulty with this category lies in the twofold tension that underpins it. First, it is easy to find good intuitive reasons both to protect and not to protect level-two possession. In fact, the way legal systems choose to deal with the holder-like possessor is the best indicator of what underlying theory of possession they adhere to, and thus why they may or may not want to protect it. Secondly, if they choose not to protect it at law, they might either declare that level-two possession is no possession at all or that, even though it is, it is possession in such circumstances that the law will not intervene if it is interfered with. Much of the terminological confusion in the field of possession is caused by the fact that both strategies, despite being incompatible, are often pursued concurrently by the law.

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<sup>17</sup> From, respectively, Lat. *custodia* = guarding, keeping and *tenere* = to hold (cf *Inhabung* in German). No label existed in classical Roman law (see Schulz, *Classical Roman Law* (n 1) 431).

<sup>18</sup> Again, the term is not classical (Schulz, *Classical Roman Law* (n 1) 432).

<sup>19</sup> E.g. Ulpian describing the possession of the usufructuary: “*naturaliter videtur possidere*”, translated by Watson as “regarded as possessing in fact” (D 41.2.12. *pr.* = Ulpian, 70 *ad Edictum*).

Against this background, brief (and by necessity insufficiently fine-tuned) summaries can be offered, *de lege lata*, of possession and its protection in Roman law, the later civilian tradition and finally English law.

## (2) Possession in Roman Law

Terminologically, classical Roman law chose to reserve the term “possession” (*possessio*) to those factual situations that gave rise to possessory remedies, as described in the next section. The alternative was simple: either holding amounted to *possessio* and it was protected, or it did not and the “sitter” would have no remedy if his control came to be challenged. In post-classical law, this neat dichotomy was marred, in particular through the introduction of the unstable labels of “civil possession” (*possessio civilis*) and “natural possession” (*possessio naturalis*).<sup>20</sup>

In terms of the substance of the law, subject to two main caveats, Roman law only protected level-one possession: he who controlled as owner was protected, but he who controlled as a holder (or as a transitory detentor) was not. In particular, to emphasise the most striking difference with both English law and some strands of the modern civilian tradition, all those who possessed pursuant to a contract – e.g. lessees, depositors, borrowers – were not deemed to have possession, and thus did not have access to possessory remedies should they lose control of the thing.<sup>21</sup>

The two caveats are as follows: first, although the level-one possessor would be protected even if he held in bad faith (e.g. a thief), he would not be protected if his possession was vitiated as against the party challenging his control – the vitiated character of the possession being established by the fact that it had been acquired *vi* (by force), *clam* (secretly), or *precario* (by grant at will). Contrary to bad faith, vitiation is a relative concept: the thief who had taken Daisy away from me at night could claim protection against someone else attempting to do the same to him; but if I managed to get Daisy back from him, he would not be able to challenge my regaining control by bringing a possessory remedy: *not* because she was mine in the first place,<sup>22</sup> but because the way he had acquired her was tainted as against me.<sup>23</sup>

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<sup>20</sup> W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd edn by P Stein (1963) 197.

<sup>21</sup> Buckland, *Text-Book* (n 20) 196; Schulz (n 1) 431.

<sup>22</sup> Below, text to n 63.

<sup>23</sup> Schulz, *Classical Roman Law* (n 1) 429.

The second caveat is that, in rare circumstances, a level-two possessor would be deemed to have *possessio* and thus would be able to avail himself of possessory remedies. The main example of this was the pledgee of a thing.<sup>24</sup>

Trying to reconstruct the underlying theory of possession which would make sense of these solutions kept the German legal academia busy for the best part of a century. While there is no need to go into this debate at any length, it is useful at least to sketch it out, because so much contemporary scholarship continues to approach issues of possession through its lens.<sup>25</sup> To cut a long story very short, Savigny first offered an interpretation along the following lines: had possession, in Roman law, the “sitter” who held the thing as if it were his own, in other words our level-one possessor. The anomalous cases, like the pledgees, he explained away as exceptions based on what we would call today “policy”: while they held in pursuance of a contract, the purpose of their holding would easily have been frustrated had they not been deemed to possess. This theory, relying heavily on the holder’s state of mind, was described as the “subjective” theory.<sup>26</sup>

It was attacked by Jhering, who considered that possession lay in the fact of holding the thing coupled with an intention so to hold (on a more than transient basis): so, for Jhering, both levels one and two qualified as possession (though level-three did not). In defence of his “objective” theory, he appealed in his turn to various considerations of policy so as to explain why possessory protection was denied to most level-two holders, despite their having *prima facie* possession according to his understanding of the term.<sup>27</sup> We shall return to the dispute when considering the grounds for protecting possession; for now, suffice it to say that D 41.2.35 is a strong indicator that the gist of Savigny’s thesis was correct.<sup>28</sup>

### (3) Possession in the civilian tradition

Moving on from the first to the second life of Roman law, the great difficulty with understanding the modern civilian tradition is that it is almost impossible to do so at a more than superficial level without knowing a significant amount of the history that

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<sup>24</sup> Schulz, *Classical Roman Law* (n 1) 429.

<sup>25</sup> A good introduction is J Gordley & U Mattei, “Protecting possession” 44 *American Journal of Comparative Law* (1996) 293 at 294ff.

<sup>26</sup> F K von Savigny, *Das Recht des Besitzes: Eine civilistische Abhandlung* (1803).

<sup>27</sup> R von Jhering, *Der Besitzwille: Zugleich eine Kritik der herrschenden juristischen Methode* (1889).

<sup>28</sup> Below (n 63).

lies behind it. That history is, in part, Roman; but the modern law was built on two other pillars: canon law and feudalism. Both, but feudalism particularly, brought with them new rules and also new concepts. Today, this threefold basis of the modern law is largely disguised by the fact that the language of the law was very largely (albeit not completely) Romanised in the run-up to modern codifications:<sup>29</sup> the student of Roman law diving into French or German law will not feel a sense of alienation. Yet the substance of the law is markedly different, even though the recasting of the law in Roman terms had a knock-on effect on its substance, which tended to be reinterpreted *as if* it were Roman law. In spite of this, differences are still clear, albeit not uniformly across jurisdictions.

The details of the story belong elsewhere. Gordley and Mattei have provided a good introductory overview in the case of the two main continental systems, France and Germany.<sup>30</sup> More will be said about these systems when considering the mechanisms protecting possession in the next section; the main point to highlight here is that the modern civilian tradition is split between two broad understandings of the notion of possession. The great divide is between those systems which restrict possession to level-one holders and those for which level-two holders also have possession. Germany is the main example of the latter class, probably due to the widespread impact of the canon-law *actio spolii* which, as will be seen, did not require the claimant to hold like an owner. This position was encapsulated in the Prussian Allgemeines Landrecht of 1794 and has remained the position of the law to the present day.<sup>31</sup> Thus, in German law, possession is defined in a very broad sense as the effective control of a thing.<sup>32</sup>

The other leading civilian jurisdiction, France, underwent an interesting movement of to-ing and fro-ing between the two approaches. While the Civil Code defines possession in such a way as to exclude only “precarious holders” (level-three possessors), thereby including (if implicitly) both levels one and two, its interpretation was firmly subjectivised in the first half of the nineteenth century, under the influence of Savigny.<sup>33</sup> As a result, courts restricted the availability of possessory remedies to

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<sup>29</sup> Van Erp & Akkermans, *Cases* (n 14) 54.

<sup>30</sup> Gordley & Mattei (n 256) at 305ff.

<sup>31</sup> Caterina, *this volume*, xxx.

<sup>32</sup> § 854 (1) BGB: “*Der Besitz einer Sache wird durch die Erlangung der tatsächlichen Gewalt über die Sache erworben*” [Possession of a thing is acquired by obtaining effective control over it]; cf J Baur & R Stürner, *Sachenrecht*, 18th edn (2009) s 7.1.

<sup>33</sup> F Zénati-Castaing & T Revet, *Les biens*, 3rd edn (2008) s 448.

level-1 possessors. However, the pendulum has been swinging back ever since, and remedies were gradually expanded to cover level-two holders as well.<sup>34</sup> Whether this means that the definition of possession has changed, or simply that remedies are now open to non-possessors as if they were possessors, has no settled answer, being irrelevant in practice.

France's daughter jurisdiction, Quebec, was first codified at a time when the French understanding of possession was heavily Savignian: not having followed France in its more recent developments, it has remained a good illustration of the first paradigm.<sup>35</sup> Austria is another example of the same.<sup>36</sup> Thus, the civilian tradition is profoundly divided between these two incompatible interpretations of the concept of possession, one rooted through Savigny in the Roman law library; the other through Jhering in canon law. Indeed, in a jurisdiction like Scotland, the debate has yet to be settled, both views enjoying a level of support in the institutional writers and modern academia.<sup>37</sup>

#### **(4) Possession in English law**

English law too emerged at the crossroads of medieval sources and Roman law. In that sense it is very much part of the wider European tradition and care must be taken not to drive too sharp a wedge between it and the civilian tradition that prevails over Continental Europe (and in Scotland). Having said this, however, it must be immediately emphasised that the mix is a very different one. The influence of Roman law was, in England, mostly formal: despite some similarities between the two traditions, which might be entirely coincidental, the substance of what we might broadly describe as the English "law of property" (a label that many common lawyers would hardly want to appropriate for themselves) is distinctively un-Roman.

Though this is a complex question, what can safely be said is that the *language* of English property has been significantly Romanised; fascinatingly, however, the extent to which it has is not stable. To put it differently, there are a number of plausible ways of packaging the outcomes of English law, and these will rely more or less heavily on Romanist language: the form of the law is, to some

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<sup>34</sup> Below, xxx; Emerich, this volume, xxx.

<sup>35</sup> Emerich, this volume, xxx, who is critical of this position.

<sup>36</sup> § 309 ABGB; cf Van Erp & Akkermans (n 14) 106.

<sup>37</sup> D L Carey Miller, *Corporeal Movables in Scots Law*, 2nd edn (2005) 18ff; K G C Reid, *The Law of Property in Scotland* (1996) ss114ff; cf R Caterina, "Concepts and remedies in the law of possession" (2004) 8 *Edinburgh Law Review* 267 at 267.



extent, up for grabs. One interesting illustration of this indetermination is the use of the civilian concept of “ownership”, where approaches will range from asserting that it is the only proprietary right (right *in rem*) that exists to denying its existence altogether.<sup>38</sup> By and large, the more the jurist expounding the law is drawn towards systematisation, the heavier reliance on Roman learning will be.

Although the use of the word of possession in English law is older,<sup>39</sup> the process of Romanisation of the concept was largely carried out – as part of a wider effort to rationalise the common law in the course of the nineteenth century – by Pollock and Wright’s 1888 book, *Possession in the Common Law*.<sup>40</sup> In particular, for better or for worse, the book introduced the language of *corpus* and *animus* – to which we shall return shortly – into the common law. Despite the very significant differences in the way possession is protected by the law, English lawyers today largely share the same linguistic toolbox as their civilian counterparts.

Crucially, just as had happened on the Continent, the modern notion of possession came to dislodge the medieval doctrine of seisin. Seisin is a feudal concept which is not peculiarly English,<sup>41</sup> although the earlier Romanisation of property law on the Continent might easily give that impression to the modern lawyer. As a legal construct, seisin is difficult to grasp: while Pollock and Maitland tell us that “[s]eisin is possession”,<sup>42</sup> the reality is that it was a multifaceted concept that lawyers left undefined, and which produced different effects depending on the various actions in the context of which it could be called upon (e.g. novel disseisin, mort d’ancestor, writs of entry).<sup>43</sup> If it was possession, at any rate, it would have been possession in a sense closer to Roman law than modern English law.<sup>44</sup>

In the modern law, possession – in the sense of possession which the law takes cognisance of by protecting it – is essentially physical control. Like civilian systems, English law shrinks, albeit reluctantly, from ascribing possession to mere transient

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<sup>38</sup> Compare B McFarlane, *The Structure of Property Law* (2008) 140 with W J Swadling, “Rescission, property and the common law” (2005) 12 LQR 123 at 133.

<sup>39</sup> The count in the action of trover or conversion, which as will be seen was one of the main vehicles to protect possession in English law, required the claimant to allege that he had been “possessed” of the disputed *res* (Hickey, this volume, xxx).

<sup>40</sup> R Hickey, *Property and the Law of Finders* (2010) 97.

<sup>41</sup> The same doctrine was known as *Gewere* in Germanic territories and *saisine* in France.

<sup>42</sup> F Pollock & F W Maitland, *The History of English Law Before the Time of Edward I*, 2nd edn, vol 2 (1968) 29.

<sup>43</sup> W W Buckland & A McNair, *Roman Law and Common Law*, 2nd edn, ed by F H Lawson (1965) 66-67; F W Maitland, “The mystery of seisin”, in H A L Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 1 (1911) 358.

<sup>44</sup> Buckland & McNair, *Roman Law* (n 43) 73.

detentors like servants<sup>45</sup> (in our terminology, level-three possessors); but it treats as possessors both level-one and level-two possessors, i.e. those who “sit upon” the thing as owners and also as mere holders.<sup>46</sup> Not only will the protection be the same; English law would not want to draw a distinction between the two classes in the first place. Thus, contrary to Roman law (but similarly, as was seen, to modern German law), English law treats the lessee, the borrower and the deposittee as possessors protected through the ordinary remedies of the law. But, as in Roman law, a degree of artificiality is brought about by the recognition that one can be deemed a possessor at law while not, or no longer, having actual control of the thing he is supposed to “sit” upon.<sup>47</sup>

As Buckland and McNair have pointed out, this wider protection of holders gives away the fact that English law adheres to a very different understanding of possession when compared to Roman law. (However, for the reasons mentioned above, this is not what sets out the common law from the modern civilian tradition.) Behind what appears to be technical and partly arbitrary decisions as to which classes of holders are or are not regarded as having possession, two completely different pictures emerge. English possession, despite some discrepancies, is essentially control: it has remained very close to the layman’s understanding, as borne out by etymology, of sitting over the thing. Roman law, on the other hand, despite Ulpian’s statement – as famous as it is misleading – that “ownership has nothing in common with possession”,<sup>48</sup> mostly conceived of possession in relation with ownership. Though, there too, there were discrepancies, the Roman possessor was typically the person who *could* be the owner and would likely become owner if he was not already.<sup>49</sup>

## **(5) The grounds of protection**

In turn, this dual perspective has consequences on the underlying reasons for protecting possession. If protected possession is owner-like control, inevitably the protection of possession will be an indirect way of protecting ownership, which on that reading is what truly matters. The claimant’s possession will be protected by the

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<sup>45</sup> Buckland & McNair, *Roman Law* (n 43) 70-1; D Sheehan, *The Principles of Personal Property Law* (2011) 9. The ancient rule was different: Pollock & Wright, *Essay* (n 12) 9.

<sup>46</sup> Buckland & McNair, *Roman Law* (n 43) 71; Sheehan, *Principles* (n 45) 9.

<sup>47</sup> Buckland & McNair, *Roman Law* (n 43) 75.

<sup>48</sup> “Nihil commune habet proprietas cum possessione”: D 41.2.12.1 (Ulpian, 70 *ad Edictum*).

<sup>49</sup> Buckland & McNair, *Roman Law* (n 43) 73-4; cf D 41.2.35, below (n 63).

law because the possessor is either the owner (at least the likely owner) or, if he is not, a possessor probably on his way to becoming the owner. Possession in bad faith naturally muddles the picture, for it is difficult to see why someone who clearly is not, and most likely will never become, the owner should nonetheless be protected; but in practice the problem will be bypassed by insisting that the claimant should come to the law with clean hands: if his possession is, to use the term typically employed, “vitiating” (e.g. by the use of force or stealth), he will not be able to avail himself of the law’s protection. The few remaining cases where the bad-faith possessor is nonetheless protected (for instance, the thief against another thief) will be explained away as instances of overshooting.

This, namely that possession is protected as the “outwork of ownership”, was the position of Jhering,<sup>50</sup> and is still dominant today in particular in French legal scholarship.<sup>51</sup> Why then, it might be asked, protect ownership indirectly, through possession, rather than directly as ownership? The short answer is, because it is much easier to prove possession than ownership (so much so that even systems which claim to draw a clear line between the two concepts are unlikely to require more to succeed in an action for the protection of ownership than proof of a better possession, whether present or past, than the defendant’s).<sup>52</sup>

On the other hand, if the protection of the law is extended to all those who hold the thing, only excluding those who are said to detain it in a transient way, then it becomes clear that possession has to be valued for its own sake. Why would it be? This is not obvious. It is clear, according to common morality, that the claim “Daisy is mine” carries with it, at least failing some very strong countervailing factors, the accessory claim “and therefore I should have her back” when someone stands between me and her. On the other hand, in itself, the claim “I sit upon Daisy” (but John is trying to wrestle her away from me) or “I sat upon Daisy” (but John has succeeded in wrestling her away) does not display any such remedial force. After all, I might be a thief and John might be the owner. Or it might be that we both spotted a wild cow in the hills; I took her first but John thinks he is equally entitled to appropriate her for himself. If we want to identify a reason for the law to intervene, we need either to add particular attributes to my possession, explaining why it should

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<sup>50</sup> Buckland, *Text-Book* (n 20) 199 and references cited.

<sup>51</sup> Emerich, *this volume*, xxx.

<sup>52</sup> Buckland & McNair, *Roman Law* (n 43) 76ff.

be protected (at least in relation to John), or else accept as a basic principle that it is wrong to disturb settled instances of factual control without due legal process. By doing this, we move to something close to the restraint of self-help and the protection of public peace as the ground for protection possession: this, as is well known, was Savigny's position.<sup>53</sup>

## (6) *Corpus and animus*

We return to the definition of possession. The reader might be surprised not to have encountered so far, but for one allusion, the two Latin terms that are most commonly associated with the notion – not only in the civilian world but also in the common-law tradition – namely, *corpus* and *animus*. The omission was deliberate, these terms posing more problems than they solve. It is however impossible not to mention them at all or try to relate them to the above developments.

Both Romanist systems and English law agree that possession consists in (or, more precisely, is acquired through) these two elements, although neither tradition has defined them.<sup>54</sup> *Corpus* (literally, “body”) is uncontroversially a form of physical control. What counts as physical control can be tricky to determine in practice, but the basic idea is clear enough. *Animus* (“mind”, “soul”) is more troublesome. Clearly it is a form of intention towards the thing on the part of the person who holds it; but the basic ambiguity that has marred the development of the law is whether it is an intention to control the thing as the owner (level-one possession: *animus domini*<sup>55</sup> or *animus rem sibi habendi*),<sup>56</sup> or an intention to control the thing as a holder (level-2 possession: *animus tenendi* or *possidendi*)<sup>57</sup>. Each time the term is used without its being made clear which is meant, which has been and remains extremely common, the ambiguity is perpetuated: for this reason, it would do no harm if lawyers stopped using the language of *corpus* and *animus* altogether.

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<sup>53</sup> Buckland, *Text-Book* (n 20) 199 and references cited; Halpérin, *Histoire* (n 1) 39; J Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006) 53ff.; Zénati-Castaing & Revet, *Biens* (n 334) s 443; Emerich, this volume, xxx. An interesting question is why the protection of possession would not, on that assumption, be left to the criminal law.

<sup>54</sup> Buckland & McNair, *Roman Law* (n 43) 70.

<sup>55</sup> From *dominus* = master.

<sup>56</sup> Literally, the “mind [of] having the thing to oneself”. Neither expression is Roman: both were coined by Savigny.

<sup>57</sup> The “mind to hold” or “to possess”. *Animus possidendi* appears e.g. in D 41.3.4.2 (Paul, 54 *ad Edictum*) and *affectio tenendi* in D 41.2.1.3 (*idem*).

Indeed, it is not difficult to see how this basic twofold understanding of possession as comprising an element of factual control and an element of intention, whatever the latter might consist in, is going to run into difficulties very quickly. A favourite example of law teachers is a situation like my car parked back home. Do I have possession of it, even though I am miles away? Most people would want to say that, failing some special circumstances (like a thief breaking in and driving it away), I do. But if so, is it because I still have *corpus* (after all, the car is locked and I have the key in my pocket) or because, even though I no longer have control, I have somehow retained my possession solely by the power of the will (“*animo solo*”, to use the received terminology)? The second option has generally been favoured,<sup>58</sup> even though it leads to puzzling results: for, if possession requires an element of control and an element of intention (*corpore et animo*),<sup>59</sup> then elementary logic dictates that it ought to cease to exist when *either* of the elements disappears (*aut corpore aut animo*).<sup>60</sup> At any rate, the fact that both interpretations are often allowed to coexist is a principal cause of conceptual instability.

## **B. THE MECHANISMS OF PROTECTION**

Focusing, from now on, on such possession as is protected by law (in the sense that the legal system is willing to intervene should it be interfered with by another), we now turn to the hows of its protection. The purpose of this section is to provide a brief overview of the mechanisms whereby possession is or was protected in Roman law, the later civilian tradition and English law. Again, the details do not belong in what is meant to be a general overview.

### **(1) Roman law**

In classical Roman law, the mechanisms that were used to protect possession considered in and by itself were the possessory interdicts.<sup>61</sup> The praetor intervened to protect possession in clusters of situations covered by three different interdicts (or

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<sup>58</sup> e.g. Schulz, *Classical Roman Law* (n 1) 442.

<sup>59</sup> D 41.2.3.1 (Paul, 54 *ad Edictum*): ‘Now we take possession physically and mentally, not mentally alone or physically alone’ (tr Watson Digest).

<sup>60</sup> Yet the principle laid down by Paul is the exact opposite: D 41.2.8 (Paul, 65 *ad Edictum*): “Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from” (tr Watson Digest).

<sup>61</sup> The term *interdicta possessoria* was however unknown to classical jurists (Schulz, *Classical Roman Law* (n 1) 444). For the exclusion of protection granted to possession *plus* an extra element (like time), see above, xxx. On the notion of an interdict, see e.g. Schulz (n 1) 59ff.

four, depending on how they are counted).<sup>62</sup> One remarkable point they had in common is that, in all cases, the dispute was entirely independent from any question of ownership (or right to possess). Not only were, to use the traditional terminology, “possessory” remedies entirely distinct from “petitory” ones; contrary to English law, it never was a defence to a possessory interdict to offer to prove that one was the rightful owner of the thing over which control was disputed: if he wanted to regain factual control of the thing, the owner had to bring an entirely different action, the *rei vindicatio* (which carried with it the – much higher – burden of proving ownership).<sup>63</sup> On the other hand, as mentioned, the person who was seeking to have his possession recognised and protected was not to have obtained it in such a way (*vi clam precario*) that it would be vitiated as against the other party.<sup>64</sup>

Two interdicts, *unde vi* and *uti possidetis*, concerned immovables ( $\approx$  land) and one, *utrubi*, movables ( $\approx$  chattels). Edicts could have a prohibitory or recuperative function, or both, depending on whether they were intended to preserve the status quo when possession was being threatened, or return to the status quo ante when the former holder had had the thing taken away from him.<sup>65</sup>

**(a) *Interdictum unde vi***

The interdict “from which, by violence” (*unde vi*) came in two forms: one when the violence used was armed and the other when it was not.<sup>66</sup>

**(i) *Interdictum de vi armata***

The “interdict concerning [the use of] armed force” was available to the possessor of land against the person who had dispossessed him with the help of armed men. The formula of the interdict ran as follows:

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<sup>62</sup> H F Jolowicz, *Historical Introduction to the Study of Roman Law* (1965) 275ff.

<sup>63</sup> D 41.2.35 (Ulpian, 5 *All Seats of Judgment*): “The outcome of a dispute over possession is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of possession will take on the role of plaintiff when the question of ownership is contested” (tr Watson Digest). This gives away the fact that possession was, for the Romans, essentially regarded as a claim to being the owner (level-one possession, above, xxx, cf n 49).

<sup>64</sup> Schulz, *Classical Roman Law* (n 1) 448.

<sup>65</sup> J 4.15.1.

<sup>66</sup> J 4.15.6.

<i>Unde tu illum vi hominibus coactis armatisve deiecisti aut familia tua deiecit, eo illum quaeque ille tunc ibi habuit restituas.</i>	Bring the plaintiff back to the place from which you have expelled him by armed force and restore also the things which the plaintiff had in that place. <sup>67</sup>
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The Romans resolved pragmatically what could have otherwise become analytically insoluble questions about possession and former possession: in the basic scenario, a former possessor who no longer holds is allowed to claim a possessory remedy against the new holder who is possessor in the strongest sense of the term (level one), because the latter's possession is regarded as vitiated by the use of force. As was noted, assertion of ownership was no defence to the defendant; what did constitute a defence (*exceptio*), however, was if the claimant had himself dispossessed the defendant by use of armed force at an earlier stage.

**(b) *Interdictum de vi non armata***

Like the previous one, the “interdict concerning non-armed force” was available to the (former) possessor of land against the person who had dispossessed him through the use of force, this time unarmed. Its formula ran as follows:

<i>Unde in hoc anno tu illum vi deiecisti aut familia tua deiecit, cum ille possideret, quod nec vi nec clam nec precario a te possideret, eo illum quaeque ille tunc ibi habuit restituas.</i>	Bring the plaintiff back to the place from which in the course of this year you have expelled him, and restore also the things which the plaintiff had in this place, provided that the plaintiff had not obtained possession from you <i>vi</i> , <i>clam</i> , or <i>precario</i> . <sup>68</sup>
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One will notice here the standard defence of vitiated possession (*exceptio vitiosae possessionis*), already mentioned.

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<sup>67</sup> Schulz, *Classical Roman Law* (n 1) 446 (his translation); cf O Lenel, *Das Edictum Perpetuum*, 3rd edn (1927) s 245.2. One will note that no technical term such as “possession” appears; only a layman notion of “having” the thing.

<sup>68</sup> Schulz, *Classical Roman Law* (n 1) 447-448 (idem); cf Lenel (n 67) s 245.1.

**(c) *Interdictum uti possidetis***

This interdict, “as you possess”, was probably the most ancient: like the previous ones it concerned immovables only; but its function was prohibitive rather than recuperative. Its formula ran as follows:

*Uti nunc eas aedes, quibus de agitur, nec vi* I forbid force to be used to prevent him of  
*nec clam nec precario alter ab altero* you two who is at present in a faultless  
*possidetis, quo minus ita possideatis, vim* possession of the disputed building from  
*fieri veto.* possessing it as he at present does.<sup>69</sup>

What it did was thus to forbid the use of force (*vim fieri veto*) pending any determination of the better right to possess. As a result, the current possessor would be defendant in any ensuing petitory suit (the *rei vindicatio*), which of course was a considerable advantage.

**(d) *Interdictum utrubi***

The interdict *utrubi* (from *utrubi... utrubi* = “on the one hand...on the other”) concerned movables and had both a prohibitive and a recuperatory function. An example of the formula, in the case of a slave, would run as follows:

*Utrubi hic homo, quo de agitur, maiore parte* He of you who for the greater part of the  
*huiusce anni nec vi nec clam nec precario ab* preceding year possessed the slave faultlessly  
*altero fuit, quo minus is eum ducat, vim fieri* may take him and I forbid force to prevent  
*veto.* him from doing so.<sup>70</sup>

The dispute between the current and the former holder of the thing would be adjudicated on the basis of who had held it longest over the year prior to the intervention of the praetor. It is he who would retain or regain possession of the thing and thus be defendant in the petitory action that would likely ensue.

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<sup>69</sup> Schulz, *Classical Roman Law* (n 1) 448 (idem); cf J 4.15.4 and D 43.17.1 *pr.* (Ulpian, 69 *ad Edictum*).

<sup>70</sup> Schulz, *Classical Roman Law* (n 1) 451 (idem); cf J 4.15.4.



*Post-classical Law.* By the time of Justinian, the above picture had been simplified. The two *interdicta unde vi* had been merged into one and the *interdictum utrubi* was done away with, protection of movables being provided in its stead through the extension to chattels of the *interdictum uti possidetis*. Thus, only two interdicts – technically they had become actions – remained: the *interdicta unde vi* and *uti possidetis*.<sup>71</sup> However, the latter was emptied of its recuperative function, leaving a gap in the law for the restoration of movables. In time, this came to be filled by the *actio spolii* of the canon law.<sup>72</sup>

## **(2) The Civilian tradition**

As was mentioned, the modern civilian notion of possession emerged at the crossroads of three sources: Roman law, canon law and feudal law. It is not surprising therefore that the mechanisms developed by the law to protect possession, being essentially the reverse side of the understanding it has of the doctrine, should also be rooted in them. The following brief developments focus, as before, on France and Germany.<sup>73</sup>

The main canon-law development was, as alluded to, the emergence of the *actio spolii* (“action for stripping”), which proved extremely influential in the later history of possession, especially in Germanic territories. The *actio* emerged from an earlier defence, the *exceptio spolii* mentioned in the canon *Redintegranda* of the Pseudo-Isidore, according to which a bishop whom secular authorities had deprived of his property or his bishopric was protected from any criminal prosecution until these had been returned to him. Under the general *exceptio spolii*, as transplanted into the civil law, any possessor in the level-one or level-two sense who was ousted from his land or chattels without his consent could reject all action brought by the dispossessor until he had been restored to his former position. The *exceptio* was later turned into an action, the *actio spolii*, which allowed possession to be regained as

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<sup>71</sup> Schulz, *Classical Roman Law* (n 1) 453.

<sup>72</sup> Schulz, *Classical Roman Law* (n 1) 453. On the *actio spolii*, see immediately below.

<sup>73</sup> For Italy, see Caterina, this volume, xxx; for the action of spuilzie and the possessory judgment in Scots law, see Anderson, this volume, xxx; for the *mandament van spolie* in South African law, see Kleyn, this volume, esp. xxx.

against not only the spoliator but also third parties who had acquired possession in the knowledge of the earlier spoliation.<sup>74</sup>

When it comes to immovables, dispossessed plaintiffs in what would become Germany could use this *actio spoli*, which came to dislodge the more restrictive Roman action *unde vi*.<sup>75</sup> In France, they had at their disposal both the *action en réintégrande* (“action for reintegration”), derived from the *actio spoli*, and the *complainte en cas de saisine et nouvelleté* (“complain in case of seisin and novelty”), an action rooted in feudal law.<sup>76</sup> As to movables, customary actions (rather than Roman interdicts) were used in both countries.<sup>77</sup> These actions had all been developed around the concept of *Gewere* or *saisine* (seisin), which later learned law came to reinterpret as possession: though boundaries can be difficult to identify with precision because the same word, “possession”, can have different (and often unspecified) shades of meaning, it is certainly true to say that, by and large, these remedies reached beyond those who would have been able to avail themselves of possessory interdicts in Roman law (i.e. essentially level-one possessors) to include at least some level-two possessors.

For threatened possession of movables, early modern German law had retained the Roman action *uti possidetis* but, when possession had already been lost, recourse had to be made to a customary action.<sup>78</sup> In France, through an interesting twist of history, the possession of movables came to be protected mainly through the use of the *rei vindicatio* (the purpose of which was to assert ownership),<sup>79</sup> most likely because the possessor who had acquired control of the thing in good faith was assumed to be the owner – a principle which crystallised in the modern presumption that “possession counts as title”.<sup>80</sup> The extent to which possessory actions can be used alongside the *action en revendication* in the case of movables was and still is disputed.<sup>81</sup>

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<sup>74</sup> M Kaser, *Roman Private Law*, tr Rolf Dannenbring, 2nd edn (1968) 92; Caterina, this volume, xxx; Gordley & Mattei (n 256) at 307.

<sup>75</sup> Gordley & Mattei (n 26) at 307.

<sup>76</sup> For the modern law, see Zénati-Castaing & Revet, *Biens* (n 334) s 488. There is a third, less important action: the *action en dénonciation de nouvelle œuvre*.

<sup>77</sup> Gordley & Mattei (n 25) at 306.

<sup>78</sup> Gordley & Mattei (n 256) at 306-307.

<sup>79</sup> Gordley & Mattei (n 256) at 312.

<sup>80</sup> Art 2276 (formerly 2279) French Civil Code: “*en fait de meubles, la possession vaut titre*”.

<sup>81</sup> Zénati-Castaing & Revet, *Biens* (n 334) ss 500, 503; F Zénati-Castaing, note in [1996] *Revue trimestrielle de droit civil* 934 ff.

Of particular interest in a French context is the relationship between the two land-focused actions of *réintégrande* and *complainte*, which were codified under Louis XIV in the Ordonnance civile of 1667.<sup>82</sup> *Réintégrande* could be brought by anyone who had been dispossessed by violence, irrespective of how long he had been in possession. *Complainte*, on the other hand, could only be relied upon by a plaintiff who had been in uninterrupted possession for a year and a day (but without a requirement of violent dispossession). It had both a prohibitory and a recuperative function: it could be brought either by someone who had already lost control, or one whose holding was being threatened by the defendant. *Complainte* was more restricted than the *actio spoli* and, in particular, could not be brought by a lessee.<sup>83</sup> The lessee was however allowed by courts to bring the *réintégrande* in the nineteenth century,<sup>84</sup> and the law was changed in 1975 to allow him to bring the *complainte* against third-party dispossessors.<sup>85</sup>

As can be seen, while their conditions were distinct, the two actions overlapped to a significant extent and also left some gaps. This is not surprising given that they had originated in two distinct bodies of law to fulfil much the same role; yet it called for rationalisation. This was mainly carried out in the nineteenth century through a process of Romanisation of what were two un-Roman actions. Taking advantage of the lack of clear boundaries, post-codification commentators, who knew their Roman law but were increasingly out of touch with pre-Civil Code customs, reinterpreted *complainte* as an action to maintain possession (like *uti possidetis*) and *réintégrande* as an action to recover it (like *unde vi*).<sup>86</sup> In this, they were following, but only in part, the lead of Pothier, who had already tried to rationalise the actions, but along different lines (merging both actions in one, the single *complainte*, which he divided into *complainte en cas de saisine ou nouvelleté*, for violent dispossession, and *action de réintégrande*, for simple disturbance).<sup>87</sup>

In codified German law, possessory remedies are now regulated by §§ 861-867 and 1007 BGB. The dispossessed plaintiff can sue for the recovery of the thing he

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<sup>82</sup> Gordley & Mattei (n 256) at 313; Caterina, this volume, xxx.

<sup>83</sup> Gordley & Mattei (n 26) at 313.

<sup>84</sup> Cass. 25 March 1857, Dalloz 1858.1.315; Gordley & Mattei (n 256) at 313.

<sup>85</sup> Law of 9 July 1975; Gordley & Mattei (n 256) at 313. The current law pertaining to possessory remedies can be found in arts 2278-9 Code civil and Art 1264-7 *Nouveau code de procédure civile*.

<sup>86</sup> Gordley & Mattei (n 256) at 317.

<sup>87</sup> Caterina, this volume, xxx and references cited.

previously possessed; and the claimant whose possession is being threatened can obtain an injunction. As in Roman law, no *exceptio domini* is allowed (rather, the owner must bring a *rei vindicatio* pursuant to § 985 BGB); but the *dominus* can raise a defence based on the vitiated character of the claimant's (earlier) possession as against him.<sup>88</sup>

### (3) English law

It is often said that the notion of possession in English law is fundamentally different from what it was and is in the Romanist tradition. It is hoped that the above will have shown how incorrect this is. English law, like the civilian tradition, Romanised to a large extent the medieval (and pan-European) notion of seisin; and made the broad choice to protect level-two as well as level-one possession – a choice that was also made in many but (as was seen) not all continental jurisdictions. When it comes to the modern understanding of possession, English law is closer to German law than, for example, French law would be.

The real divide lies, if anywhere, in the *consequences* attached to possession (though here too the statement will have to be nuanced). First, according to English orthodoxy, possession immediately creates ownership. This proposition, entirely baffling for the civilian lawyer,<sup>89</sup> can only be understood against the background of the doctrine of relative ownership (or, to use a more common word, “title”), according to which anyone who holds a thing in such a way as to qualify as its possessor becomes ipso facto its owner: not the owner, but *an* owner of the thing.<sup>90</sup> Title, in turn, is understood as a right to possess,<sup>91</sup> which can vest in a variety of persons. As a result, in a dispute over possession-ownership-title, will prevail the party who can show the *better* title, i.e. the better right to possess (which typically will derive from evidence of earlier possession). Consonant with the principle of relative title, A might prevail over B as having a better entitlement to possess a given thing, only to be

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<sup>88</sup> Van Erp & Akkermans, *Cases* (n 14) 120; Baur & Stürner (n 31) ss 9.16ff.

<sup>89</sup> However, the English collapse of the two notions has a number of echoes in the Romanist tradition, e.g. the principle of *occupatio* (acquisition of the ownership of an ownerless thing by grabbing it) or the presumption that the possessor of a movable is its owner which avails under French law (above, n 80) or German law (§ 1006 BGB).

<sup>90</sup> Pollock & Wright, *Essay* (n 12) 22; Hickey, *Property* (n 40) 162ff.; S Douglas, *Liability for Wrongful Interferences with Chattels* (2011) 24ff., McFarlane (n 38) 144ff.

<sup>91</sup> Sheehan, *Principles* (n 45) 13.

defeated later by C who can prove an ever better title.<sup>92</sup> This is fundamentally at odds with the rhetoric of Roman law and systems rooted in it, even though it has been rightly remarked that the distance might be much smaller when it comes to the actual operation of the law.<sup>93</sup>

In terms of the protection of possession (*qua* title), English law draws a clear distinction between movables and immovables – in English terminology, though the approximation is imperfect, chattels and land. As far as the former are concerned, a fundamental difference with the civilian tradition is that English law always protects possession-title (as indeed all property rights) indirectly, i.e. through personal rather than real actions.<sup>94</sup> The basis of the action is not the assertion of the possession-title but the wrong committed when the defendant interfered with it unlawfully. Overwhelmingly, the cause of action used will be the tort (civil wrong) of conversion.<sup>95</sup> The successful plaintiff will recover money damages, although since 1977 courts have had the power to make an order for the return of the thing itself.<sup>96</sup>

When it comes to land, however, English law did develop an action *in rem*, the action of ejectment. The history of the action is a complex one; and it is likely that what was passed off in the nineteenth century as a rationalisation, moving beyond (to use Pollock's phrase) "the details of the old law",<sup>97</sup> made in reality not insignificant changes to the law. Hickey has argued for this point persuasively.<sup>98</sup> Be that as it may, it is clear that, in the modern law, an action for the recovery of land is open to the possessor of realty and constitutes the common law's principal mechanism for the protection of possession.<sup>99</sup>

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<sup>92</sup> D Fox, "Relativity of title in law and at equity" (2006) CLJ 330; cf Buckland & McNair, *Roman Law* (n 43) 67.

<sup>93</sup> Birks (n 6) at 27ff.

<sup>94</sup> Douglas, *Liability* (n 901) 1ff.

<sup>95</sup> Hickey, *Property* (n 40) 98. For the argument that conversion performs in English law what was the function of the *rei vindicatio* in Roman law, see R Hickey, "Wrongs and the Protection of Personal Property" [2011] Conv 48, 49-50.

<sup>96</sup> Torts (Interference with Goods) Act 1977, s 3(2)(a).

<sup>97</sup> Pollock & Wright, *Essay* (n 12) 94.

<sup>98</sup> Hickey, *Property* (n 40) 102ff.

<sup>99</sup> Technically the action of ejectment was abolished in 1852 (Common Law Procedure Act 1852, ss 168-221) but the Act did not alter the substance of the law. English law will now speak of an action to recover land, in untechnical terms, where the old law would have spoken of ejectment.

### C. POSSESSION AS A FACT AND POSSESSION AS A RIGHT

One of the old chestnuts in the law of property is to ask whether possession is a “fact” or a “right”. While, as Buckland remarked in the context of Roman law, “the question whether *possessio* was or was not a right is somewhat empty”,<sup>100</sup> a few remarks can profitably be made in the present context.

First, of course, the two terms of the dichotomy are not mutually exclusive and the answer need not be either/or. Second, whether possession is a fact depends on what is meant by “fact”. In one sense, anything that exists in reality (even the reality of the mind) is a fact. On that basis, possession will of course be a fact (as will ownership, with which it is typically contrasted when it suggested that one is a “right” while the other is a mere “fact”);<sup>101</sup> but this tells us nothing of substance about it. If what is meant, on the other hand, is that whether an individual has possession of a thing or not is a sheer question of fact – as opposed to law – then this is demonstrably untrue. The moment a legal system recognises that someone can be deemed to be the possessor of a thing which he does not actually control (for example because it has been taken from him), possession can no longer be said to be simply a matter of fact:<sup>102</sup> by refining it away from the layman’s notion of “sitting upon”, the law has also turned the existence of a possessory relationship between person A and thing x into an – at least partly – legal question.

As to whether possession is a right, this question is complicated by there being two very different things that might refer to. If by right, in respect of possession, is meant a right *to* possession (i.e. a right to be granted control of a thing one does not currently hold), then it is hard to deny that such a right can exist. Indeed, “right to possession” (or to “immediate possession”) is a common definition of ownership-title in English law;<sup>103</sup> and German scholars started to speak the same language (*ius possidendi*) in the nineteenth century.<sup>104</sup>

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<sup>100</sup> Buckland, *Text-Book* (n 20) 203.

<sup>101</sup> This was indeed the language used by Roman lawyers: B Nicholas, *An Introduction to Roman Law* (1962) 114.

<sup>102</sup> Nicholas, *Introduction* (n 101) 115.

<sup>103</sup> See e.g. Honoré (n 4) at 113: “The right to possess, viz. to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. Sheehan, *Principles* (n 45) 5: “the right to possession is the root of all title to chattels at common law”. This right to possess does not have to be absolute, simply better than that of the party against whom it is asserted.

<sup>104</sup> Gordley, *Foundations* (n 534) 53. The expression is naturally older, although instances are scarce before the nineteenth century.

Distinct is the question whether the relationship of factual control, coupled with intention, is itself a right (besides being a fact). It makes no doubt that possession is, in Schulz' words, "a fact ... endowed with legal consequences".<sup>105</sup> It is a relationship between a person and a thing which is, within certain parameters, protected by the law. Is this – a legally protected relationship – not a perfectly good definition of what a right is? In that sense, possession does indeed seem to be a right: the right of possession (*ius possessionis*). The difficulty that crops up immediately is how it can be transferred. Thus, my heir can inherit my ownership of Daisy; but can I bequeath to him possession of the *res* I controlled before death? Presumably he would need to grab it for himself, in which case, provided he has the right intention, he would become possessor anyway, whether or not I had instituted him heir of all my patrimony (for the same reason, it is not clear whether I could sell my possession of Daisy: if possession is a right, it does not appear to have any assignable value). Not only this, but it would seem that, the moment I die, my right of possession vanishes for want of the requisite elements of *corpus* and *animus* – in which case there is nothing left for my heir to inherit.

The Romans were confronted with this difficulty and maintained that possession could pass from the deceased to his heir: "When we are instituted heirs", Javolenus writes, "once we accept the inheritance, all the rights pertaining thereto belong to us; but possession does not become ours unless we physically take it".<sup>106</sup> By what legal mechanism this was possible, we are not told. The later civilian tradition developed the doctrine that *le mort saisit le vif* ("the dead seizes the living"), according to which – surprising as this might seem in the light of general principles – possession can pass instantly to the heir at the point of death. This makes possession similar to any patrimonial right. An alternative would be to consider possession not as a patrimonial right but as a personality right: fully a right, but not one that can be detached from the person who holds it. This was Aubry and Rau's position,<sup>107</sup> but it has not met with much success.

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<sup>105</sup> Schulz, *Classical Roman Law* (n 1) 428.

<sup>106</sup> D 41.2.23 *pr.* (Javolenus, 1 *Letters*); cf Buckland, *Text-Book* (n 20) 201.

<sup>107</sup> Zénati-Castaing & Revet, *Biens* (n 334) s 655.

#### D. “QUASI-POSSESSION”: THE POSSESSION OF INCORPOREALS

To finish this introduction, we return to the question which was put on hold at the very beginning: namely, “What can be the object of possession?” It was said that we would proceed on the assumption that these were corporeal (i.e. tangible) things: as Paul writes, “those things can be possessed which are corporeal”.<sup>108</sup> For reasons that will be explained presently, this is indeed the only correct view. However, this has been doubted and, accordingly, the dissenting strand needs to be considered.

To cut a long story short, Roman law came to recognise that some incorporeal things, in particular the right of usufruct, could be possessed. Thus, in the Digest, Ulpian states that the interdict *unde vi* will be available to the usufructuary if he is prevented from using and enjoying the thing object of his usufruct.<sup>109</sup> The reason, we are told, is that “preventing someone from using and enjoying is held to be ejecting him forcibly from the usufruct”.<sup>110</sup> the right to *usus* and *fructus* is being interfered with, and a remedy is granted in the form of a possessory interdict. Such possession of an incorporeal is referred to in some sources as *quasi possessio*.<sup>111</sup>

Building on these fragments, the later civilian tradition broadened the doctrine of (quasi-) possession of incorporeals. While Germany ultimately rejected it on the back of the Pandectists,<sup>112</sup> it was and remains recognised, at least in principle, in such jurisdictions as France,<sup>113</sup> South Africa,<sup>114</sup> and – perhaps most of all, under the influence of writers like Karl Ferdinand Hommel in the eighteenth century – Austria.<sup>115</sup> A common example where the doctrine is applied would be the case of the tenant whose landlord has cut off the provision of gas or electricity: instead of, or as an alternative to, treating the tenant’s action as a contractual claim (which it undoubtedly is), the law will regard the possession of the right to be provided with these utilities as the basis for an action *in rem*.<sup>116</sup> This is extremely puzzling, and on this logic it is not clear – to mention but this one issue – how the entirety of the law of contract is not going to be swallowed up by the law of property. More fundamentally,

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<sup>108</sup> D 41.2.3 *pr.* (Paul, 54 *ad Edictum*) (tr Watson Digest).

<sup>109</sup> D 43.16.3.13 (Ulpian, 69 *ad Edictum*).

<sup>110</sup> D 43.16.3.14 (Ulpian, 69 *ad Edictum*) (tr Watson Digest).

<sup>111</sup> e.g. D 43.16.3.17 (*idem*).

<sup>112</sup> Van Erp & Akkermans, *Cases* (n 14) 104.

<sup>113</sup> Van Erp & Akkermans, *Cases* (n 14) 100; Zénati-Castaing & Revet, *Biens* (n 334) ss 441, 448; B Bourinet-Parance, *La possession des biens incorporels* (2008).

<sup>114</sup> Kleyn, this volume, xxx.

<sup>115</sup> ABGB, § 311 (*Rechtsbesitz*); Van Erp & Akkermans, *Cases* (n 14) 106; Rüfner, this volume, xxx.

<sup>116</sup> Rüfner, this volume, xxx; compare Kleyn, this volume, xxx.



such a proposition is predicated on a misunderstanding of the relationship between a thing and a right. This point is important and deserves being paused on.

As is well known, Gaius in his Institutes took the bold step of aligning corporeal things with rights. Among our assets, there are on the one hand things that “can be touched – land, a slave, clothes, gold, silver”:<sup>117</sup> corporeal things (*res corporales*). Then, on the other hand, there are things that “cannot be touched. They consist of legal rights”: incorporeal things (*res incorporales*).<sup>118</sup> Thus, for Gaius, rights coordinated with tangible things as two types of *res*, in the sense of assets.

Tony Thomas hailed this extension of the concept of things to encompass rights as a “feat of abstraction and rationalisation”.<sup>119</sup> It was; but the feat was incomplete. Starting with “clothes, gold and silver” – objects of wealth because they can be appropriated and traded – Gaius noted that other entities are objects of wealth too. Such are a usufruct or an obligation (seen from the perspective of the creditor): we are better off with them than without them. Rights, both *in rem* and *in personam*, are assets.

What Gaius failed to perceive, however, is that the reasoning can and should be carried further. For, if we look at Gaius’ list of intangible *res*, or rights, there is one that is conspicuously missing: ownership itself. It is easy to see why: had Gaius said that his assets consisted of the cow Daisy, a usufruct over Blackacre, a right that Primus should pay him thirty and the ownership of Daisy, he would have counted his cow twice. A tangible thing and the right of ownership therein are practically undistinguishable. But, analytically, it is the right of ownership which should be aligned with the other rights: the usufruct over Blackacre stands level with the ownership of Daisy, not with Daisy herself (who is incommensurable). We need to carry through to its logical conclusion Gaius’ magisterial intuition, that rights too are valuable: in reality, *only* rights are valuable. Daisy has no value in herself; it is because the law protects the relationship I have over her when I claim that she is mine, and allows me to trade it, that this relationship (in law, a right of ownership) is valuable.

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<sup>117</sup> Gai 2.13 (tr Gordon & Robinson); cf J 2.2.1.

<sup>118</sup> Gai 2.14 (tr Gordon & Robinson); cf J 2.2.2.

<sup>119</sup> J A C Thomas, *Textbook of Roman Law* (1976) 126 cited in Kleyn, this volume, xxx.

All my assets, therefore, consist of rights. But rights themselves are not owned. Nor are they possessed. Ownership is a right, and so is possession if we accept the above analysis: ownership, possession, usufruct, obligation, etc., are legally protected relationships, whether with a thing or a person. The metaphor is that of a leash in my hand, which at the other end is tied around a *res* or around someone else's neck. But to describe my holding them in my hand, another word is needed. It cannot be ownership, which is already used to describe a type of leash; a *fortiori* can it not be possession. George Gretton has suggested "titularity":<sup>120</sup> I am the titular of the rights. The drawback of this phrase is that there is no active verb to indicate the corresponding act. "Holding" is a possibility: I hold rights in my hand. The fundamental point is that, whereas rights can be varied, there is only one type of relationship I can have with "my" rights: I *hold* them. I can no more possess them than I can own them or have a usufruct over them. The possession of rights is an analytical impossibility, and prefacing the alleged possession with the word "quasi" can do nothing to rescue it. Despite Ulpian and his misguided heirs, there is no such thing as the possession of incorporeals.<sup>121</sup>

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<sup>120</sup> G Gretton, "Ownership and its objects"(2007) 71 *Rabels Zeitschrift* 802 at 834.

<sup>121</sup> Part of the difficulty with Gaius' analysis is that, from a modern perspective, we are happy to recognise the existence of incorporeal things other than rights: in other words, intangible things *in which* rights reside. For example, a product of the intellect can be the object of rights, independently of any physical manifestation it might have. In that sense, which is not Gaius', things (items of wealth) can indeed be incorporeal. These can certainly be owned, but it is difficult to see how they could meaningfully be said to be possessed: how can one be "sitting over" something that cannot be physically located? Unless perhaps we accept that we can possess things which exist in our mind: should this difficulty be overcome, the final sentence would simply need to be rewritten as "there is no such thing as the possession of incorporeals".